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Selective Disclosure: The Abrogation of the Attorney-Client Privilege and the Work Product Doctrine

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Selective Disclosure: The Abrogation of the Attorney-Client Privilege and the Work Product Doctrine

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This Comment addresses an emerging problem of the utmost importance, identified by public and private companies, the government, and academia in the legal and business environments.¹ Companies are expected both to implement controls for dealing with fraud internally and to provide their auditors with detailed information on a wide range of corporate issues, even if such information includes attorney-client privileged communications

1. See David M. Brodsky et al., *The Auditor's Need For The Client's Detailed Information vs. The Client's Need to Preserve the Attorney-Client Privilege and Work Product Protection: The Debate, The Problems and Proposed Solutions*, 2005 A.B.A. PRESIDENTIAL TASK FORCE ON THE ATTORNEY-CLIENT PRIVILEGE 1. The auditors and investigators of companies must be given the leeway to obtain as much information as possible to effectively perform their duties. See *id.* This need must be balanced with the ability of companies to protect their communications from disclosure with both the attorney-client privilege and the work product doctrine. See *id.* The problem concerning waiver of the attorney-client privilege and the work product doctrine is extremely critical to the functioning of capital markets and the general public interest, but the case law is convoluted. See *id.* at 2; see also Andrew M. Apfelberg & William McC. Wright, *Responding to Audit Inquiry Letters: Working with Your Client to Provide Full Disclosure While Protecting Sensitive Information*, 18-6 AM. BANKR. INST. J. 22, 38 (1999) (finding that "[c]ourts are split on whether the response to an audit inquiry letter is a waiver of the protections of the work product doctrine.").

or work product.² This expectation has shaken the framework of the attorney-client privilege and the work product doctrine.³

As early as 1977, federal courts began to create an exception to the attorney-client privilege and work product doctrine.⁴ This exception, now known as the “limited waiver” or “special exception,”⁵ allows corporations disclosing attorney-client privileged communications to the Securities and Exchange Commission (“SEC” or “Commission”), or other governmental investigatory bodies, to maintain the privileged status of those communications after disclosure.⁶ Part I of this Comment provides the history of the attorney-client privilege.⁷ Part II provides the history of the work product doctrine.⁸ Part III details a history of the weakening of the attorney-client privilege and the work product doctrine in relation to the special waiver.⁹ Part IV gives an overview of the current state of selective waiver law and an analysis of how circuit courts and district courts differ in their reasoning and holdings.¹⁰ Part V addresses the areas of business and law where the adoption or denial of a selective waiver may have drastic implications, and what those implications may mean for the limited waiver.¹¹ Part VI concludes this Comment.¹²

2. Brodsky et al., *supra* note 1, at 1.

3. The Metropolitan Corporate Counsel, *Waiver of Attorney-Client Privilege*, Jan. 2002, http://www.darbylaw.com/news/news_article.asp?id=1701&archive=1 (discussing the state of the attorney-client privilege and finding that “[t]he moral of these legal campfire horror stories for in-house counsel is simple. Your course of action must be consistent: either waive the privilege entirely or maintain the confidentiality as to the entire communication. You must choose—but choose wisely.”).

4. See Beth S. Dorris, *The Limited Waiver Rule: Creation of an SEC-Corporation Privilege*, 36 STAN. L. REV. 789, 797-98 (1984).

5. It seems lawyers, judges and scholars use the terms “limited waiver” and “selective waiver” interchangeably in reference to this doctrine. I will do the same. *But see* Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1423 n.7 (3d Cir. 1991) (“Although the rule in *Diversified* is often referred to as the ‘limited waiver rule,’ we prefer not to use that phrase because the word ‘limited’ refers to two distinct types of waivers: selective and partial.”). The *Westinghouse* court found that “[s]elective waiver permits the client who has disclosed privileged communications to one party to continue asserting the privilege against other parties. Partial waiver permits a client who has disclosed a portion of privileged communications to continue asserting the privilege as to the remaining portions of the same communications.” *Id.*

6. See Dorris, *supra* note 4, at 797-800.

7. See *infra* notes 13-36 and accompanying text.

8. See *infra* notes 37-54 and accompanying text.

9. See *infra* notes 55-67 and accompanying text.

10. See *infra* notes 68-225 and accompanying text.

11. See *infra* notes 226-55 and accompanying text.

12. See *infra* notes 256-59 and accompanying text.

I. BACKGROUND: THE ATTORNEY-CLIENT PRIVILEGE

Case law from the late eighteenth and early nineteenth centuries elucidates the attorney's duty not to disclose a client's secrets.¹³ It is not the secretive nature of the communication, but the confidential nature of the attorney-client relationship upon which the attorney-client privilege is founded.¹⁴ Historically, the attorney-client privilege would not bar an attorney from disclosing a communication if a third person was present when the communication took place.¹⁵ Courts imposed a secrecy requirement that implied both an objective and a subjective dimension.¹⁶ Objectively, the communication must be kept secret between an attorney and the client.¹⁷ Subjectively, the client must have intended that the communication be secret and that the secrecy be maintained.¹⁸ Modernly, however, the attorney-client privilege's purpose is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."¹⁹

13. Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should be Abolished*, 47 DUKE L.J. 853, 868 (1998). Because the privilege was not instated unless the communication occurred in secret, secrecy was both a condition precedent for the privilege to attach and a necessary condition for the continuation of the privilege. *Id.* at 872.

14. *See id.* at 856-57. The secrecy requirement is often raised because it provides a theoretical bright line for determining "when the privilege's protection begins and ends." *Id.* at 856. But beyond this "convenient marker for determining the beginning and end of the protection, however, the secrecy requirement does not further the goal of the attorney-client privilege . . ." *Id.* at 857.

15. *Id.* at 859-62. The confidentiality requirement implies that the client wishes the information communicated between the attorney and the client to remain confidential unless it is said in the presence of others. *See id.* at 859. If made in the presence of others, the communication would be presumed not to be confidential. *See id.*

16. *Id.* at 872-73. This notion is hotly contested. "The fallacy in this reasoning is that it equates secrecy with safety; it assumes that a client who is not concerned with public embarrassment is also unconcerned about being legally compromised by the use of these communications." *Id.* at 859-60. Author Rice also discussed Wigmore, editor of the renowned treatise, who brought forth the notion of secrecy within the attorney-client relationship. *Id.* at 859. His example of a third person overhearing a communication and, therefore, being allowed to disclose what he hears, assumed that "[t]he presence of a third person will usually be treated as indicating that the communication was not confidential." *See id.* at 869 n.41 (quoting 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 245 (John Henry Wigmore ed., 16th ed. 1899)). This leads to the conclusion that a level of secrecy must exist for the privilege to attach to a communication. *See generally id.* at 854-60.

17. *See id.* at 872. If an attorney exposes the confidential information to a third party, such as a government agency, the privilege may be abrogated. *Id.*

18. *See id.* at 872-73.

19. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (detailing the purpose of the attorney-client privilege). Rice elucidated that this "secrecy requirement does not further the goal of the

As soon as the attorney and the client exchange information “in secret,” “the privilege is created and remains viable until the secret . . . is out.”²⁰ The privilege is waived when the litigant or his counsel voluntarily discloses information to an adversarial third party.²¹ Whether this purposeful, “selective waiver” to one party waives the privilege as to *all* parties is the subject of this Comment.²² By assuring that the privileged communication cannot be used against the client, the assumption is that the client will communicate frankly and openly with his or her attorney.²³ The attorney-client privilege is founded upon the notion that legal consultation serves the public interest, and that this interest is best promoted when the client feels no qualms about fully informing his attorney of the facts of his legal dilemma.²⁴ The Federal Rules of Evidence have substantively implemented the attorney-client privilege as it has been developed in common law.²⁵

The benefits conveyed by this privilege to the legal profession and to the pursuit of justice are disputed.²⁶ It has been argued that if the purpose of law

attorney-client privilege—encouraging openness and candor in communications between an attorney and client.” Rice, *supra* note 13, at 857.

20. Rice, *supra* note 13, at 856-57 (internal citation omitted).

21. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 (6th Cir. 2002) (finding that “[a]s a general rule, the ‘attorney-client privilege is waived by voluntary disclosure of private communications by an individual or corporation to third parties.’” (quoting *In re Grand Jury Proceedings* October 12, 1995, 78 F.3d 251, 254 (6th Cir. 1996))). The privilege may also be waived if the client’s conduct implies disclosure or waiver. See *In re Columbia/HCA Healthcare*, 293 F.3d at 294.

22. Arguments and reasoning supporting the arguments for and against the selective waiver are presented in this Comment. See *infra* Parts III-V.

23. Rice, *supra* note 13, at 858.

24. *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 348 (1985). The *Weintraub* Court commented on the integral aspect of the attorney-client privilege in the corporate setting, but noted that “[t]he administration of the attorney-client privilege in the case of corporations, however, presents special problems. As an inanimate entity, a corporation must act through agents. A corporation cannot speak directly to its lawyers. Similarly, it cannot directly waive the privilege when disclosure is in its best interest.” *Id.*

25. See American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307, 311 (2003) [hereinafter ACTL]. Although usually applied narrowly, federal courts have employed Judge Wyzanski’s approach from *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950), in which Judge Wyzanski applied the privilege if:

- (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

ACTL, *supra*, at 311-12 (citing *United Shoe Machinery*, 89 F. Supp. at 358-59).

26. See ACTL, *supra* note 25, at 316-18. The attorney-client privilege often denies the admission of powerful evidence that may be used by the other party. *Id.* at 316. For instance, a

is to uncover the truth, this privilege only hinders the pursuit of justice.²⁷ However, there is an equally-important necessity of ensuring the right of every person to freely and fully confer and confide in one having legal knowledge so that the individual may have proper legal advice and a proper defense.²⁸ Furthermore, by promoting full disclosure to counsel, the truth-finding and justice-promoting principles are well served;²⁹ that is, in an adversarial system, the client's interests are best achieved by loyal and fully informed advocates.³⁰

The benefits of the attorney-client privilege to the public are undisputed.³¹ Similarly to the benefits of the work product doctrine, the attorney-client privilege permits attorneys to zealously represent their clients' interests. This safeguard fosters a public policy that seeks to assure "the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the

defendant's own admission of guilt can be protected by the privilege. *Id.* On the whole, however, the legal system adheres to the understanding that the benefits of excluding evidence outweigh the harm. *Id.*

27. See *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1423-24 (3d Cir. 1991). "Because the attorney-client privilege obstructs the truth-finding process, it is construed narrowly." *Id.* at 1423. "The privilege 'protects *only* those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege.'" *Id.* at 1423-24 (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976) (emphasis added)).

28. See *id.* at 1423. "[T]he purpose of the attorney-client privilege is to encourage 'full and frank communication between attorneys and their clients.'" *Id.* (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). "Full and frank communication is not an end in itself, however, but merely a means to achieve the ultimate purpose of the privilege: 'promoting broader public interests . . .'" *Id.* (quoting *Upjohn*, 449 U.S. at 389). The *Westinghouse* court continued, "[t]he attorney-client privilege 'is founded upon the necessity . . . of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.'" *Id.* (quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)). But see *Neal v. Honeywell, Inc.*, No. 93 C 1143, 1995 U.S. Dist. LEXIS 14488, at *13-14 (N.D. Ill. Oct. 3, 1995). The *Neal* court found that "[c]ourts need not allow a claim of privilege when the party claiming the privilege seeks to use it in a way that is not consistent with the purpose of the privilege." *Id.* at *13 (quoting *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982)). The *Neal* court believed that "since the purpose of the attorney-client privilege is to protect the confidentiality of attorney-client communications in order to foster candor within the attorney-client relationship, voluntary breach of confidence or selective disclosure for tactical purposes waives the privilege." *Id.* at *13-14 (quoting *In re Sealed Case*, 676 F.2d at 818).

29. Rice, *supra* note 13, at 858.

30. See *id.*

31. See ACTL, *supra* note 25, at 316 ("This valuable social service of counseling clients and bringing them into compliance with the law cannot be performed effectively if clients are scared to tell their lawyers what they are doing, for fear that their lawyers will be turned into government informants." (quoting *United States v. Chen*, 99 F.3d 1495, 1500 (9th Cir. 1996))).

former may have adequate advice and a proper defense.”³² If the attorney can easily be compelled to produce the privileged communications, the client will not disclose any unfavorable information.³³ The attorney will then become nothing more than a messenger of the facts, rather than a strategist of the client’s case.

Similar to the attorney-client privilege that attaches between an individual and an attorney, the corporate attorney-client privilege is between the client—the corporation—and the attorney.³⁴ Whether all employees within a corporation should be able to gain the benefits of the attorney-client privilege has been a subject of debate.³⁵ The *Upjohn* Court further clarified that the protection applies to corporate internal investigations and the daily task of corporate counseling.³⁶

II. BACKGROUND: THE WORK PRODUCT DOCTRINE

Similar to the attorney-client privilege, the work product doctrine is derived from common law.³⁷ At common law, however, the work product doctrine was much broader than the form in which it exists at present; previously, anything in the attorney’s possession was protected from discovery.³⁸ The work product doctrine, as applied today, evolved from the Supreme Court’s decision in *Hickman v. Taylor*.³⁹ There, the Court held that

32. *Mitchell v. Superior Court*, 691 P.2d 642, 646 (Cal. 1984) (quoting *Baird v. Koerner*, 279 F.2d 623, 629 (9th Cir. 1960)).

33. See ACTL, *supra* note 25, at 316 (“Any perceived harm to the fact-finding process attributable to the attorney-client privilege and work product doctrine may be exaggerated because, without these protections, clients may well choose not to disclose sensitive information to their attorneys . . .”).

34. *Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981).

35. See Rice, *supra* note 13, at 863 n.28 (citing *Upjohn*, 449 U.S. at 394-95). The Court noted that when facing a corporate scenario, employees beyond the “‘officers and agents . . . responsible for directing [the company’s] actions in response to legal advice’ . . . will possess information needed by the corporation’s lawyers.” *Upjohn*, 449 U.S. at 391 (quoting *United States v. Upjohn Co.*, 600 F.2d 1223, 1225 (6th Cir. 1979)). “Middle-level—and indeed lower-level—employees can . . . embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client . . .” *Id.* Thus, the attorney-client privilege can and does commonly protect almost every member of a corporation, given that anyone who has incriminating evidence can be protected. See *id.*

36. *Upjohn*, 449 U.S. at 394-95.

37. See *id.* at 397.

38. See ACTL, *supra* note 25, at 314.

39. 329 U.S. 495 (1947). The *Hickman* Court was presented with the issue of the extent opposing counsel may discover oral and written statements and other materials that were prepared by an “adverse party’s counsel” during the course of getting ready for litigation. *Id.* at 497. The Court reasoned that these types of disclosures must be handled with special care, given that the examination into an attorney’s files may cause “unwarranted excursions into the privacy of a man’s work.” *Id.* The Court strove to balance this potential harm with the public’s interest in what the Court defined as “reasonable and necessary inquiries.” *Id.* The materials in question in *Hickman*

"[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."⁴⁰ However, the Court tempered that broad statement with precautionary language:

[Where there is] an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties . . . , it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.⁴¹

The *Hickman* Court also expounded upon the public and private purpose of the work product doctrine.⁴² From a public standpoint, the work product doctrine enables attorneys to prepare their clients' cases without the worry of opposing counsel discovering their strategies.⁴³ The *Hickman* Court stated that the work product doctrine allows the attorney to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference."⁴⁴ In this way, "lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests."⁴⁵ The private purpose is straightforward: attorneys need privacy

were both written statements from witness interviewed by defense counsel and the contents of oral interviews with witnesses, some of which had been summarized in memoranda prepared by the defense lawyers. *Id.* at 498. The Court held that both were protected. *Id.* at 512-13.

40. *Id.* at 507-08.

41. *Id.* at 510.

42. See ACTL, *supra* note 25, at 314.

43. See *id.* (citing *Hickman*, 329 U.S. at 510-11). The Federal Rules of Civil Procedure state that materials "prepared in anticipation of litigation" by the attorney are not discoverable unless the party seeking discovery can show a "substantial need of the materials . . . and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." See FED. R. CIV. P. 26(b)(3). If a sufficient showing is made, "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.*

44. *Hickman*, 329 U.S. at 511.

45. *Id.* The Court stated that without the work product doctrine, "[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.*

to serve as effective counsel, and the work product privilege promotes this privacy.⁴⁶

Although both the attorney-client privilege and the work product doctrine are derived from common law, they have significant differences. The work product doctrine's purpose is to foster the proper presentation of a party's case.⁴⁷ The work product privilege, however, is not absolute.⁴⁸ "[I]f a party seeking discovery shows that 'relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case,'" then the opposing party may be compelled to disclose the otherwise privileged material.⁴⁹ Furthermore, the work product privilege is separable into fact work product and opinion work product.⁵⁰ Fact work product is discoverable upon a showing of substantial need and the party's inability to obtain the material any other way without undue hardship.⁵¹ Fact work product may be discoverable if, for instance, a witness is very difficult to reach or if facts are relevant, non-privileged, and give clues to other relevant information.⁵² Opinion work product includes the attorney's impressions, opinions, ideas, and litigation strategies.⁵³ The discoverability of opinion work product depends heavily upon circumstance and the judge overseeing the case.⁵⁴

III. THE WEAKENING OF THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES THROUGH THE SELECTIVE WAIVER

Although the attorney-client privilege traditionally required absolute secrecy, the limited waiver repeals this notion.⁵⁵ The limited waiver allows

46. See ACTL, *supra* note 25, at 314 ("[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." (citing *Hickman*, 329 U.S. at 510-11)).

47. See *Hickman*, 329 U.S. at 510-11 n.9.

48. See, e.g., *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

49. ACTL, *supra* note 25, at 314 (quoting *Hickman*, 329 U.S. at 511). But see *Permian Corp. v. United States*, 665 F.2d 1214, 1222 (D.C. Cir. 1981) (holding that the work product doctrine does not allow production of certain documents already disclosed to the SEC, even though the party waived the attorney-client privilege by such disclosure).

50. See FED. R. CIV. P. 26(b)(3).

51. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 (6th Cir. 2002).

52. *Hickman*, 329 U.S. at 511.

53. See FED. R. CIV. P. 26(b)(3).

54. See generally *Sporck v. Peil*, 759 F.2d 312, 317 (3d Cir. 1985) (holding that the trial court has an obligation to prevent the unjustified disclosure of the defense attorney's opinion work product). Absent waiver, opinion work product is generally not discoverable. *In re Columbia/HCA Healthcare*, 293 F.3d at 294.

55. Rice, *supra* note 13, at 882-83. If a limited waiver is permitted, the body receiving the disclosed information (typically the government) is able to use that information in a settlement with the corporation without plaintiffs' firms later obtaining the information. *Id.* at 883. Logically, the

a client to disclose confidential communications to a third party and limit the scope of the waiver to that third party only.⁵⁶

For example, federal prosecutors in investigatory organizations such as the SEC and the Department of Justice ("DOJ") commonly ask corporate counsel to waive the attorney-client privilege and turn over work product and attorney-client protected materials.⁵⁷ Corporations undoubtedly wish they could hand over the documents for the sole purpose of assisting the SEC or other federal agency.⁵⁸ However, without use of the selective or limited waiver, a third party may use the disclosed information against the corporation at some future time.⁵⁹ Thus, the disclosure of this likely-incriminating evidence can be very costly to corporations.

Once faced with allegations of illegal behavior, a corporation, in most cases, will conduct an internal investigation.⁶⁰ This investigation is usually supervised by outside counsel, who will conduct the entire investigation by using a detailed process designed to uncover every possible area of wrongdoing.⁶¹ Generally, the organization conducting the internal investigation will inform the employees that their communications are not privileged, which will result in many employees becoming less cooperative with the investigation.⁶² This lack of cooperation leads to increased costs and decreased accuracy and thoroughness.

Proponents of the special waiver argue that the efficiency of the investigation would increase if the corporation were to allow the investigating party to obtain whatever information it needed without fear of losing the privileges which traditionally protect an attorney and his or her

selective waiver destroys the rationale that the original communication between the attorney and client was protected solely because the communication was a "secret."

56. See *id.* at 883.

57. See Brodsky et al., *supra* note 1, at 1-2. The reasons why the privileges are commonly asked to be waived include the investigatory agencies' need for a complete and detailed account of the illegal activities that took place. See *id.* The high costs of going to court discourage the agencies from taking the case to trial, and the risk of loss caused by litigating against a federal investigatory and enforcement agency encourages corporations to work with the agency by disclosing otherwise confidential information. See, e.g., Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1890-91 (2005).

58. See ACTL, *supra* note 25, at 319.

59. See Rice, *supra* note 13, at 883-84.

60. ACTL, *supra* note 25, at 317-18.

61. *Id.* at 317; see generally Brodsky et al., *supra* note 1, at 1-2.

62. ACTL, *supra* note 25, at 317-18.

client.⁶³ The SEC believes that voluntary production of information that is protected by the attorney-client privilege or the work product doctrine greatly enhances the Commission's investigative efforts and, in most cases, makes the Commission's investigations operate more efficiently.⁶⁴

In the past once the government had chosen which crimes to charge and had obtained a conviction, the Federal Sentencing Guidelines previously prescribed the sentence for the crime.⁶⁵ Consequently, prosecutors were able to exert a great measure of control over both the charging and sentencing processes.⁶⁶ Although the Supreme Court ruled that the Federal Sentencing Guidelines are unconstitutional,⁶⁷ the resulting effect of this ruling on the government's leverage has yet to be determined.

IV. AN ANALYSIS OF THE SELECTIVE WAIVER

A. *The SEC's Treatment of the Selective Waiver*

The SEC issued the final guidelines of Section 307 of the Sarbanes-Oxley Act ("the Act") on January 29, 2003, setting the minimum standards

63. See Richard M. Strassberg & Sarah E. Walters, *White-Collar Crime: Is Selective Waiver of Privilege Viable?*, N.Y.L.J., July 7, 2003, at 2 (emphasizing how the Eighth Circuit adopted the minority position in favor of the selective waiver, and did so based on the policy concerns implicated in not finding in favor of the selective waiver); see also ACTL, *supra* note 25, at 318 (illustrating the benefits of the attorney-client privilege in that "by facilitating internal investigations, the corporate attorney-client privilege and work product doctrine advance the administration of justice by enabling the corporation to gather the information necessary to understand the relevant issues, to receive competent legal advice, [and] to identify culpable employees . . .").

64. See Stephen M. Cutler et al., *Document Preservation and Production in Connection with Securities and Exchange Commission Investigations and Enforcement Actions*, 1520 PLI CORP. L. 300, 422 (2005). But see Judith Burns, *SEC Sued for Failing to Release Corporate Documents*, DOWJONES NEWSWIREs, Oct. 22, 2004. Ironically, the SEC has not always followed its own rules. Author Judith Burns wrote that the SEC has been using the Freedom of Information Act ("FOIA") to obtain documents, but has not disclosed whether or not these documents exist. *Id.* Plaintiff research firms—the firms who want these disclosures so they may inform the public of firms under investigation—complain the SEC uses the law enforcement exemption to the FOIA to preclude the documents from being released under the FOIA, but only when FOIA requests are made by these particular firms. *Id.*

65. The Federal Sentencing Guidelines have been ruled unconstitutional by the Supreme Court. See *United States v. Booker*, 125 S. Ct. 738 (2005). For further discussion regarding the overturning of the Federal Sentencing Guidelines in relation to the selective waiver, see *infra* notes 226-38 and accompanying text.

66. Rice, *supra* note 13, at 880-91. The federal prosecutor was acting as both the judge and the jury. See *id.* The government decided which crimes would be charged with full knowledge of the Federal Sentencing Guidelines sentence for the crime, if proved. See *id.* Accordingly, the prosecution had a great amount of leverage when negotiating with corporations and forcing those corporations to disclose whatever the government deemed important. See *id.*

67. See *Booker*, 125 S. Ct. at 746.

of conduct for attorneys practicing before the SEC.⁶⁸ The initial drafting of the selective waiver read: “[w]here an issuer, through its attorney, shares with the Commission information related to a material violation, pursuant to a confidentiality agreement, such sharing of information shall not constitute a waiver of any otherwise applicable privilege or protection as to other persons.”⁶⁹ This original draft of the selective waiver was not adopted by the SEC.⁷⁰

In the implementation put forth by the SEC, the Commission recognized the unresolved nature of the selective waiver issue among the courts.⁷¹ While noting the split in circuits, the SEC remarked it does not want to adopt a selective waiver as part of a final rule, and did not do so, for several reasons.⁷²

First, many legal analysts have noted that the SEC does not, or alternatively should not, have the power to “promulgate a rule that would control decisions by state and federal courts concerning whether a disclosure to the SEC, even if conditioned on a confidentiality agreement, waived the attorney-client privilege or work-product protection.”⁷³ Furthermore, if the SEC did promulgate such a rule, it would be against the weight of authority on the issue.⁷⁴ And this alone could cause drastic problems in light of the fact that some courts may simply refuse to enforce the “SEC waiver,” leading to adverse consequences for attorneys and their clients who “disclose information to the SEC pursuant to a confidentiality agreement” with the understanding that their disclosures will be protected.⁷⁵ But the SEC stated it will continue to enter into confidentiality agreements when it determines that its receipt of confidential information pursuant to confidentiality agreements will further the public interest.⁷⁶

68. Akin Gump Strauss Hauer & Feld, LLP, Corporate Governance Alert: SEC Issues Final Rules Regarding Attorney Conduct (Feb. 19, 2003), <http://www.akingump.com/docs/publication/535.pdf>.

69. *Id.* (quoting Sarbanes-Oxley Proposed Selective Waiver Provision).

70. *Id.* The original proposal was substantially modified, but the concept remained the same throughout. *See id.*

71. *Id.* The Commission noted the difficulty courts have had interpreting the selective waiver. *See id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

B. The Circuit Split on Selective Waiver

Since 1978, the United States Courts of Appeals have been divided regarding how to handle selective waiver. The three different positions are: (1) selective waiver is permissible; (2) selective waiver is never permissible; and (3) selective waiver is permissible only in situations where the government has, prior to the disclosure, signed a binding confidentiality agreement with the corporation.⁷⁷

Although the attorney-client privilege is ordinarily waived by disclosure of privileged information to a third party, a circuit split exists over whether waiver occurs when disclosure is made to the government.⁷⁸ The Eighth Circuit has held that the attorney-client privilege is waived only with respect to the government, and the D.C. Circuit takes the position that the disclosure of privileged information to any third party, including the government, destroys the privilege.⁷⁹ The D.C. Circuit represents the majority rule, which is followed by the Third Circuit and most others.⁸⁰

77. See generally *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 295-307 (6th Cir. 2002). The district court noted that "allowing a party to preserve the doctrine's protection while disclosing work product to a government agency could actually discourage attorneys from fully preparing their cases." *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 192 F.R.D. 575, 580 (M.D. Tenn. 2000) (quoting *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1429-30 (3d Cir. 1991)). Accordingly, the district court found that "Columbia/HCA waived any protection from discovery under the attorney-client privilege or the work product doctrine for documents disclosed to the government" *Id.*

78. *Westinghouse*, 951 F.2d at 1424-25. Without directly addressing the issue, the *Westinghouse* court found that disclosures made with the reasonable expectation that they will not be given to an adversary may not waive the work product doctrine. *Id.* at 1430. This begs the question: who is an adversary? See *id.* The Third Circuit felt that disclosure to the government was disclosure to an adversary. *Id.* at 1428-29. Accordingly, the disclosure waived the work product doctrine and the issue of whether a confidentiality agreement existed was of no relevance. See *id.* at 1429-30. "Thus, allowing a party to preserve the doctrine's protection while disclosing work product to a government agency could actually discourage attorneys from fully preparing their cases." *Id.* at 1430.

79. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) (permitting the attorney-client privilege to be selectively waived); see also *Westinghouse*, 951 F.2d at 1420; cf. *In re Subpoenas Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984) (noting that waiving the attorney-client privilege for one waives it for all). The Third Circuit reasoned that "attorneys are still free to prepare their cases without fear of disclosure to an adversary as long as they and their clients refrain from making such disclosures themselves. Creating an exception for disclosures to government agencies may actually hinder the operation of the work-product doctrine." *Westinghouse*, 951 F.2d at 1429.

80. See, e.g., *In re Subpoenas Duces Tecum*, 738 F.2d at 1367; see also *Westinghouse*, 951 F.2d at 1421.

The Eighth Circuit decided in *Diversified Industries, Inc. v. Meredith*⁸¹ that selective waiver is permissible.⁸² *Diversified Industries* ("Diversified"), a Delaware corporation operating in Missouri, was a manufacturer and processor of scrap copper, brass, and brass products.⁸³ During a shareholder fight, it became clear that Diversified had been paying bribes to obtain business.⁸⁴ Diversified formed an independent audit committee and prepared an internal report on the issue with the assistance of the law firm Wilmer, Cutler & Pickering, LLP.⁸⁵ Likely through the use of a subpoena, the SEC obtained a copy of this report.⁸⁶ One of the parties bribed by Diversified brought suit in order to obtain the audit report, prepared by Arthur Andersen.⁸⁷ The district court granted the order requiring Diversified

81. Although not the touchstone of the Eighth Circuit's analysis, the court analyzed the two tests that have developed in federal courts examining when employee communications are considered the corporate client's communications. *Diversified*, 572 F.2d at 608. The first test is the "control group" test. See *id.* (citing *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 483-85 (E.D. Pa. 1962)). In this test, an employee's statements are "not considered a corporate communication unless the employee 'is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of [an] attorney.'" *Id.* (quoting *Westinghouse*, 210 F. Supp. at 485). The second test states that an employee's communications are classified as the corporate client's communications when "an employee of a corporation . . . makes the communication at the direction of his superiors in the corporation and where the subject matter . . . is the performance by the employee of the duties of his employment." *Id.* (quoting *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491-92 (7th Cir. 1970)). The choice between the two tests can lead to a communication raising the need for the selective waiver analysis, or the communication being completely outside the scope of the selective waiver. In *Diversified*, the court found that the materials in question were within the scope of the selective waiver. See *id.* at 609. The Eighth Circuit adopted the second test because the first is "inadequate for determining the extent of a corporation's attorney-client privilege." *Id.*

82. See *id.* at 610.

83. *Id.* at 607.

84. *Id.* During proxy fight litigation involving Diversified in 1975, it was revealed that Diversified may have maintained a "slush" fund to bribe clients, including Weatherhead Corporation. *Id.* "On July 9, 1976, Weatherhead filed a complaint in the District Court alleging that Diversified conspired with Weatherhead employees to sell Weatherhead an inferior grade of copper" *Id.* "[I]n return for accepting the inferior copper, [certain] Weatherhead employees were paid bribes out of this 'slush' fund." *Id.*

85. *Id.* at 607-08. Wilmer, Cutler & Pickering also conducted a professional investigation and interviewed many employees, analyzed the accounting data, evaluated propriety of past transactions and made recommendations for possible future action. *Id.* at 610. The court considered whether employee interviews were within the scope of the attorney-client privilege. *Id.*

86. *Id.* at 611.

87. *Id.* at 615 (Henley, J., concurring in part and dissenting in part).

to produce the documents in question.⁸⁸ The Eighth Circuit, however, found that these materials were protected by the attorney-client privilege.⁸⁹

The Eighth Circuit reasoned that because the documents were disclosed in a separate and non-public SEC investigation, only a limited waiver—to the SEC—occurred.⁹⁰ The court went on to state that “[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.”⁹¹

The Eighth Circuit allowed the selective waiver for the primary purpose of encouraging corporations to undertake internal investigations.⁹² The Eighth Circuit is the only appellate court to have decided in favor of the selective waiver.⁹³ However, the dissent in the Sixth Circuit case *In re Columbia HCA/Healthcare*, written by Judge Boggs, is persuasively written and argues that a selective waiver is necessary and would invaluable increase the amount of information available in government investigations.⁹⁴

Judge Boggs believed that a corporation’s readiness to disclose harmful or detrimental information to investigators should not be given too much credit.⁹⁵ The majority argued that without a limited waiver rule, *more*

88. *Id.* at 606-08.

89. *Id.* at 611. “We conclude that these employee interviews are confidential communications of the corporate client and entitled to the attorney-client privilege.” *Id.* But see *id.* at 612 n.1 (Henley, J., concurring in part and dissenting in part) (“As will be seen, I do not consider that the attorney-client privilege is available to Diversified in this case. Nor do I consider that the material in question is protected ‘work product’ . . .”).

90. *Id.* at 611. The court’s holding is founded upon case law in other subjects. See, e.g., *id.* (citing *United States v. Goodman*, 289 F.2d 256, 259 (4th Cir. 1961), *vacated on other grounds*, 368 U.S. 14 (1961) (involving the ability to invoke the Fifth Amendment privilege against self-incrimination in a subsequent criminal investigation)); *id.* (citing *Bucks County Bank & Trust Co. v. Storck*, 297 F. Supp. 1122, 1123 (D. Haw. 1969) (holding that testimony during a suppression hearing is not admissible in a subsequent criminal trial)).

91. *Id.* “[W]e note that the litigants are not foreclosed from obtaining the same information from non-privileged sources. Litigants may still examine business documents, . . . interview non-employees, obtain preexisting documents and financial records not prepared by Diversified for the purpose of communications with the law firm in confidence.” *Id.*

92. See *id.* The *Westinghouse* court also acknowledged that “[t]he Eighth Circuit’s sole justification for permitting selective waiver was to encourage corporations to undertake internal investigations.” *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991).

93. *Diversified* remains the sole supporter of the limited waiver. See *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1370 (D.C. Cir. 1984). The *In re Subpoenas Duces Tecum* court held that although cooperation with a government agency is doubtlessly virtuous, it in no way furthers the attorney-client relationship. *Id.* The court felt that if the client feels the need to keep his communications with his attorney confidential, the client should continually assert the traditional attorney-client privilege—and at the “traditional price”—even if it is the SEC asking for disclosure. *Id.* (quoting *Permian Corp. v. United States*, 665 F.2d 1214, 1222 (D.C. Cir. 1981)).

94. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 307 (6th Cir. 2002) (Boggs, J., dissenting).

95. See *id.*

participants will have access to the disclosed information.⁹⁶ However, Judge Boggs does not presuppose corporate America's veracity.⁹⁷

Judge Boggs argued that the true choice is either disclosure only to government investigatory agencies, or "no disclosure at all."⁹⁸ He wrote that a "government exception" would increase the total amount of information available to the government and would aid in the truth-seeking process and further the public's interest.⁹⁹

When the government undertakes an investigation it is likely to be pursuing much different goals than a private attorney.¹⁰⁰ Private litigants typically have monetary goals in mind, and most have unlimited resources with which to pursue these goals.¹⁰¹ The government, in contrast, generally seeks the truth, without a personal monetary stake in the investigation.¹⁰² Consequently, when the government seeks privileged information, it is

96. *Id.*

97. *See id.* This is a wise conclusion, given the recent corporate scandals.

98. *See id.* (emphasis omitted). In explaining, Judge Boggs noted that if the material is never disclosed, it will remain protected by the privilege, even against plaintiffs' firms. *Id.* at 312. Therefore, the question is not whether to allow disclosure to private litigants after disclosure to the government, but instead, whether there should be a privilege that would simply "create incentives that permit voluntary disclosures to the government . . ." *Id.* "[E]ither the government gets the disclosure made palatable because of the exception, or neither the government nor any private party becomes privy to the privileged material." *Id.*

99. *Id.* at 312. Judge Boggs gave a scathing review of the majority's contention that a special waiver would only obfuscate the truth seeking process. *See id.* He argued against this notion with the assertion that the majority simply missed the mark in its analysis. *Id.* (citing *id.* at 303 (majority opinion)). Judge Boggs explained that "[t]he government is not about cover-ups, rather it should 'act to bring to light illegal activities.' I wonder what exactly the [majority] thinks the government would be doing if permitted to encourage voluntary disclosure through confidentiality agreements." *Id.* (internal citation omitted). Judge Boggs believed that "[t]he government either could use the information to find additional evidence or could present the privileged information if it decided to initiate a criminal prosecution or civil action." *Id.* He noted that the confidentiality agreement is not what protects the documents from disclosure, "but instead the privilege itself." *Id.* Judge Boggs believed that if a limited waiver is not permitted, more information will be kept in the dark. *Id.* "The exception aids the government in bringing violations of the law to light." *Id.* at 312-13. Moreover, Judge Boggs indicated who he thinks is "generally more important" as between the government and private litigants. *Id.* at 312. Where he saw private litigants operating with an incentive to "press the legal envelope," he viewed government officials as being more selective, and therefore more likely to promote the public's interest. *Id.* Thus, allowing the limited waiver would lead to, on the whole, more information being available. *Id.* In comparison, denying the limited waiver would cause "an incomplete view of the facts, where exposed evidence would be contradicted by concealed privileged information." *Id.* at 310.

100. *See id.* at 312.

101. *Id.*

102. *See generally infra* note 170 and accompanying text.

unlikely that the information will be as broad as a private litigant would seek in a similar situation.¹⁰³

Judge Boggs dismissed the majority's review of the law, given that the majority only addressed whether to allow a limited waiver or not.¹⁰⁴ He envisioned four scenarios: (1) accept the limited waiver rationale;¹⁰⁵ (2) reject the limited waiver, but without discussion of whether a confidentiality agreement would be valid;¹⁰⁶ (3) reject the limited waiver withstanding a confidentiality agreement;¹⁰⁷ and (4) allow the limited waiver with disclosures between one government agency and another.¹⁰⁸

The majority only distinguished between courts that allow the limited waiver and those that do not, but Judge Boggs believed the court should analyze the attorney-client privilege and the work product doctrine separately under each scenario.¹⁰⁹ Judge Boggs thought the "third-party waiver rule" (limited waiver) need not be affected by the justifications of the attorney-client privilege.¹¹⁰ However, when the question is whether the attorney-client privilege is waived, the burden must shift to the "presumption in favor of preserving the privilege."¹¹¹

The attorney-client privilege acknowledges that once a client has disclosed information to a third party, "the client does not appear to have been desirous of secrecy."¹¹² The majority used this notion and suggested that if clients are willing to disclose information to third parties without the privilege, then "chances are that they would also have divulged it to their

103. *Id.*

104. *In re Columbia/HCA Healthcare*, 293 F.3d at 307 (Boggs, J., dissenting).

105. *Id.* (citing *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977)). In support of this contention, Judge Boggs argued that "exclusion of privileged information conceals no probative evidence that would otherwise exist without the privilege." *Id.* at 309. Therefore, allowing the limited waiver would result in no less information being available to attorneys. *Id.*

106. *Id.* at 307 (citing *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981)).

107. *Id.* at 307-08 (citing *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1427 (3d Cir. 1991)).

108. *Id.* at 308 (citing *United States v. MIT*, 129 F.3d 681, 686 (1st Cir. 1997)). The most interesting point Judge Boggs made is that the majority spun the current state of the law to appear favorable to its position. *Id.* at 307. While explaining the circuit courts' split, he added that although the Eighth Circuit is the only circuit to directly accept the limited waiver, only one other circuit court has actually faced the same issue. *Id.* at 307-08. Every opinion coming down against the selective waiver, save *Westinghouse*, has either been within situation (1), (2), or (4), *supra*, not (3). See *id.* Directly rejecting the selective waiver, even though the corporation entered into a facially valid confidentiality agreement, has occurred only once. *Id.* (citing *Westinghouse*, 951 F.2d at 1427).

109. *Id.* at 308-14.

110. *Id.* at 308.

111. *Id.* (quoting *In re Perrigo Co.*, 128 F.3d 430, 440 (6th Cir. 1997)) (noting that courts should always begin an analysis of the attorney-client privilege with the presumption of preserving the privilege).

112. *Id.* at 309 (citing 8 WIGMORE ON EVIDENCE § 2311, at 599 (2d ed. 1961)).

attorneys, even without the protection of the privilege."¹¹³ But this conclusion presupposes that the client knows the future.¹¹⁴ It is impossible to accurately define the motivation behind the privileged communication at the time the communication was made.¹¹⁵ Specifically, the fact that the client was willing to disclose privileged information to the government at a later time says nothing about whether the client would have communicated with its attorney—without the privilege—at the beginning.¹¹⁶

Furthermore, Judge Boggs illustrated the flaw in arguing that the attorney-client privilege is not meant to protect communications between the government and a private individual.¹¹⁷ The relevant question is not whether the communication between the government and the individual is protected, but "whether the communication between the government and the holder of the privilege *waives* the already existing privilege."¹¹⁸

One of the leading arguments against the selective waiver, the sword-and-shield argument, can be disproved. Requiring that there either be full confidentiality or full disclosure forces courts to conclude that corporations will give up the most favorable information while guarding against disclosure of the most damaging.¹¹⁹ If a corporation knows that the selective waiver will not offer protection, it will not disclose possibly incriminating privileged information and the court will not have a complete view of the facts of the case.¹²⁰ Although it is true that the holder of the privilege should not be able to selectively waive the privilege to some parties but retain it for others, this concern should not weigh against the strong public policy

113. *Id.* (quoting *Westinghouse*, 951 F.2d at 1424).

114. *Id.*

115. *See id.*

116. *Id.* Judge Boggs immediately dismissed the majority's conclusion that the limited waiver "has little, if any, relation to fostering frank communication between a client and his or her attorney." *Id.* (quoting *id.* at 302 (majority opinion)). He believed that this argument leaves out the element of time. *Id.* Because attorneys and their clients cannot predict the future, there is no reason to assume motivation behind the communication from a later disclosure. *Id.* Judge Boggs noted:

That a client is willing to disclose privileged information to the government at time T2 indicates very little indeed about whether she would have communicated with her attorney, absent the promise of the privilege, at time T1. In the meantime, the client certainly has learned more about intervening events and perhaps has become more legally sophisticated (through the informed legal advice arising from her candid communication with her attorney).

Id.

117. *See id.* at 309 n.2.

118. *Id.*

119. *See id.* at 310 (citing *United States v. Workman*, 138 F.3d 1261, 1263-64 (8th Cir. 1998)).

120. *See id.* (citing *United States v. Collis*, 128 F.3d 313, 320 (6th Cir. 1997)).

considerations involved in aiding the efficiency of government investigations.¹²¹

Thus, if there must be some allowance of the tactical advantages involved with the selective waiver, consideration must be given to the negative effects of such conduct. Instead of being overly cautious in protecting a litigant's strategic disclosure, one must weigh both sides of the argument. Ultimately, it becomes an issue of public policy: do the benefits gained by the government being able to have the privileged information outweigh the harm done by certain litigants using the rule to strategically disclose information?¹²²

The harms of selective disclosure are not entirely defined.¹²³ Because of this vagueness, a decision should not be made against the selective waiver without considering the benefits, especially when the benefits of allowing the selective waiver have readily identifiable strengths.¹²⁴ For example, government investigations will be exponentially aided and increasingly

121. See *id.* at 310-11; see also *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981) ("The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others . . ."). But it is important that, if there is a way to protect against the sword-and-shield predisposition of disclosing parties, government investigations be aided in any reasonable way possible. See *In re Columbia/HCA Healthcare*, 293 F.3d at 311 (Boggs, J., dissenting) (noting that the majority's rule rejecting selective waiver will merely increase the cost of a party's cooperation with the government). Thus, by rejecting selective waiver, government investigations will become more difficult because of decreased cooperation, so the government will need some other reasonable aid to ensure effective investigations.

122. See *In re Columbia/HCA Healthcare*, 293 F.3d at 311 (Boggs, J., dissenting).

123. See *supra* notes 68-121 and accompanying text for a discussion of many issues that have arisen with the selective waiver rule and the problems that could result from adopting it. For example, the SEC has recognized that many of the circuit courts are split on the issue of the selective waiver and several legal analysts have noted the potential problems that could arise if the SEC were to adopt the rule. See *id.*; see also Nancy Horton Burke, *The Price of Cooperating with the Government: Possible Waiver of the Attorney-Client and Work Product Privileges*, 49 BAYLOR L. REV. 33, 35 (1997) (noting that several circuit courts have refused to embrace the selective waiver and that their reason for doing so "varied depending on the underlying factual circumstances"). Author Burke noted that many of the courts rejected use of the waiver based "largely on public policy grounds" rather than some specific harm that may result from the rule. See *id.*; see also Dorris, *supra* note 4, at 801-15 (detailing problems with the selective waiver and proposing that the waiver be abandoned).

124. Some scholars have noted that "[a] legal system that fails to assure public companies the benefits of the attorney-client privilege and work product doctrine protection denies those companies the effective assistance of counsel when potentially illegal corporate behavior is discovered." Brodsky et al., *supra* note 1, at 14. For example, when a company discloses "information to auditors regarding the handling of whistleblower allegations, companies risk waiving privileges to the extent that the information includes attorney-client communications, witness interviews, advice of counsel, and other legal work and analyses." *Id.* at 14 n.47. "This type of information is at the heart of what companies reasonably expect—through long-standing and sound precedent—will be protected from actual and potential litigation adversaries." *Id.*

efficient with the allowance of the selective waiver.¹²⁵ By not allowing the selective waiver, a court is simply increasing the costs of cooperating with the government.¹²⁶ This may be best explained in the sense that the current "complete waiver" waives all privileged information to a third party once the information is disclosed, leaving corporations with little incentive to be completely honest when disclosing possibly incriminating evidence.¹²⁷

Because a complete waiver occurs when the privileged information has been disclosed to the government, the penalty for waiver is high.¹²⁸ Detractors of the limited waiver rule put forth the contention that there are "other means" by which the information may be obtained.¹²⁹ However, the subpoenas and discovery process which would produce this information result in more time and money being expended for a similar effect.¹³⁰ Furthermore, assuming the government can access this information simply because they have "other means" may prove too conclusory.¹³¹

Two far more compelling reasons for allowing the selective waiver are still unaddressed. When the government undertakes an investigation, it usually begins with a much different burden than a private litigant.¹³² Allowing a privilege to the government to aid investigations would not only

125. *But see id.* at 16 n.54 (noting that a group "of attorneys who practice before the SEC . . . commented that internal investigations conducted by a company to respond to fraud allegations may cause more harm than good because the SEC now regularly demands waiver of privileges, and [t]hat information is then discoverable by plaintiffs' lawyers in civil litigation" (internal quotation marks omitted)).

126. The SEC has stated that "[t]he choice is thus between disclosure only to government agencies, which will increase the effectiveness and efficiency of governmental investigations, and no disclosure at all—not a choice between disclosure only to government agencies and disclosure to all parties." Brief for The Securities and Exchange Commission as Amici Curiae Supporting Appellant at 18, *United States v. Bergonzi*, 403 F.3d 1048 (9th Cir. 2005) (No. 03-10511), 2004 WL 1394246 (citing *In re Columbia/HCA Healthcare*, 293 F.3d at 307). Thus, the SEC felt that a disclosure to the Commission should "not result in waiver of work-product protection because preserving work-product protection is in the public interest." *Id.* at 1.

127. *See In re Columbia/HCA Healthcare*, 293 F.3d at 310 (Boggs, J., dissenting) (citing *United States v. Collis*, 128 F.3d 313, 320 (6th Cir. 1997)).

128. *But see supra* notes 55-59 and accompanying text (noting that if selective waiver is permitted, corporations could limit the scope of their waivers).

129. *See In re Columbia/HCA Healthcare*, 293 F.3d at 311 (Boggs, J., dissenting) (citing *United States v. MIT*, 129 F.3d 681, 685 (1st Cir. 1997)).

130. *See id.* at 311.

131. *See id.*

132. *See id.* at 312. Judge Boggs found this argument particularly convincing. *See id.* He stated that "government investigators and prosecutors start at a tactical disadvantage to private plaintiffs given the procedural protections afforded criminal defendants against the government I am comfortable . . . providing a clear exception for government investigations, and leaving private litigants out." *Id.*

be of practical benefit, but also procedural benefit.¹³³ Another concern regarding a so-called “government/corporation privilege” is the notion that the investigatory agency may become lenient with the corporation.¹³⁴ In light of the SEC’s inclination to be friendly with corporations facing scrutiny, it would be to the public’s peril if the SEC relaxed its enforcement of legal standards.¹³⁵

However, most courts believe that always allowing a limited waiver is not in the public’s best interest. Some courts have adopted the approach of approving the “some selective waiver” rule.¹³⁶ This middle-ground approach is founded upon the notion that if the disclosing corporation and the government specifically reserve the privilege through a confidentiality agreement prior to the disclosure, then the confidentiality agreement should be binding.¹³⁷

The seminal case in the “some selective waiver” history is *Teachers Insurance and Annuity Association of America v. Shamrock Broadcasting Co.*¹³⁸ As with most cases dealing with a limited waiver, *Teachers Insurance* involved an investigation into alleged wrongdoing which occurred during the 1970s.¹³⁹ The investigation dealt primarily with a series of questionable loans by Shamrock Broadcasting Company.¹⁴⁰ Through subpoenas, the SEC accumulated numerous documents regarding these questionable dealings.¹⁴¹ Because Teachers was a shareholder of Shamrock

133. See *id.*

134. Dorris, *supra* note 4, at 820.

135. See *id.*

136. See *Teachers Ins. & Annuity Ass’n of Am. v. Shamrock Broad. Co.*, 521 F. Supp. 638, 641 (S.D.N.Y. 1981) (finding that “disclosure is not a waiver if it is compelled by court order or made pursuant to a stipulation reserving the right to assert the [attorney-client or work product] privilege[s].” (internal citations omitted)).

137. See *id.*; see also *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993) (agreeing that the “selective assertion of privilege should not be merely another brush on an attorney’s palette, utilized and manipulated to gain tactical or strategic advantage.”); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1370 (D.C. Cir. 1984) (finding that a “client cannot be permitted to pick and choose among his opponents, waiving the privilege as to some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.” (quoting *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981))). But see *Permian Corp.*, 665 F.2d at 1220-21 (rejecting the pick and choose theory of the attorney-client privilege).

138. *Teachers Ins.*, 521 F. Supp. at 638.

139. *Id.* at 639-40. The plaintiff (“Teachers”) sued the Starr Broadcasting Group, Inc. “to recover damages for Starr’s failure to honor Teachers’ exercise of two Starr stock warrants at the exercise price to which Teachers contended it was entitled.” *Id.* at 639. Once the lawsuit began, Starr merged with Shamrock. *Id.* The parties agreed that Shamrock would be the defendant, not Starr. *Id.*

140. *Id.* at 640.

141. *Id.* The subpoena stated “that the SEC may seek a court order directing compliance should Teachers not produce the documents called for . . .” *Id.* (citing Subpoena issued by the SEC (Sept. 22, 1976)). The subpoena also stated that the information the SEC sought could be used “[i]n any

Broadcasting Company, it wished to obtain the accumulated documents.¹⁴² The SEC subpoena specifically stated that the information sought was to be used "principally for the purpose of investigating possible violations of the federal securities laws."¹⁴³ Although Shamrock did give a principal reason for the disclosure, it did not enter into a confidentiality agreement with the SEC.¹⁴⁴ After a thorough review of the current state of the law, the New York district court created the "some limited waiver" rule.¹⁴⁵

The *Teachers Insurance* court found that "disclosure to the SEC should be deemed to be a complete waiver of the attorney-client privilege *unless* the right to assert the privilege in subsequent proceedings is specifically reserved at the time the disclosure is made."¹⁴⁶ The court's logic in allowing a limited waiver when properly reserved by the corporation was that "[i]t does not appear that such a reservation would be difficult to assert, nor that it would substantially curtail the investigatory ability of the SEC."¹⁴⁷ The court concluded,

Accordingly, the Court will not rule that Teachers has not waived the privilege as a matter of law The parties shall contact the Court within five days of the date of this Opinion . . . [to determine] whether the documents sought were in fact privileged, which documents were turned over to the SEC, and whether express claims of confidentiality were made as to the documents turned over at the time they were so disclosed.¹⁴⁸

proceeding where the Federal securities laws are in issue or in which the Commission or past or present members of its staff is a party or otherwise involved in an official capacity." *Id.* (quoting Subpoena issued by the SEC (Sept. 22, 1976)).

142. *See id.* at 639.

143. *Id.* at 640.

144. *Id.* at 639.

145. *Id.* at 646.

146. *Id.* at 644-45 (emphasis added). But the court was wary of another attribute of the privilege. "[The privilege] cannot be used 'as a sword,' offensively i.e., . . . a party cannot, by selective invocation of the privilege, disclose documents or give testimony favorable to that party while failing to disclose cognate material unfavorable to that party." *Id.* at 641. "As a corollary to this principle, courts have ruled that when a party discloses part of an otherwise privileged communication, he must in fairness disclose the entire communication, or at least so much of it as will make the disclosure complete and not misleadingly one-sided." *Id.*

147. *Id.* at 646.

148. *Id.*

The Second Circuit's opinion, *In re Steinhardt Partners, L.P.*, involved an SEC investigation into the treasuries market.¹⁴⁹ In compliance with the SEC, Steinhardt prepared information to disclose to the Commission.¹⁵⁰ Although this information was labeled "FOIA Confidential Treatment Requested," no actual confidentiality agreement was in place before the disclosure to the government agency.¹⁵¹ The Second Circuit, although declining "to adopt a per se rule that all voluntary disclosures to the government waive the work product protection," rejected the selective waiver doctrine.¹⁵²

The linchpin of the court's analysis for rejecting the selective waiver was that the SEC's Enforcement Division acted as an adversary when it subpoenaed the corporation, therefore abrogating the attorney-client privilege.¹⁵³ Interestingly, although the *In re Steinhardt* court rejected the selective waiver in this instance, it noted that establishing a rigid rule against the selective waiver would fail to anticipate situations in which the disclosing party and the government share an interest in developing legal strategies.¹⁵⁴ The court further implied that it would have to consider the facts differently if there was an explicit agreement.¹⁵⁵ This leads to the plausible conclusion that the Second Circuit will not protect corporations

149. 9 F.3d 230 (2d. Cir. 1993). Specifically, "highly publicized allegations" of theft in the market for Treasury notes were occurring in June 1991. *Id.* "[T]he SEC began an informal investigation of the Treasury markets. As part of this informal investigation, the SEC asked Steinhardt, among many others, to provide certain documents related to its trading activities." *Id.* Following the informal investigation in 1991, the SEC issued a subpoena to Steinhardt. *Id.*

150. *Id.* at 232. This was a voluntary submission to the SEC which contained legal theories. *See id.* at 234.

151. *Id.* at 232. For further discussion of the Freedom of Information Act and any possible conflict with the selective waiver, see *infra* note 186 and accompanying text.

152. *In re Steinhardt*, 9 F.3d at 236. The court held that "selective assertion of privilege should not be merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage." *Id.* at 235.

153. *Id.* at 234. The court agreed with the district court's conclusion that "the SEC stood in an adversarial position to Steinhardt when it requested assistance." *Id.* The court further explained that this was not a situation in which two parties were acting in a benign manner towards each other. *Id.* This was not a routine investigation by the SEC; to the contrary, it was an investigation into corporate wrongdoing, and both parties were aware of the possible consequences. *Id.* The court reasoned that "[t]he determinative fact in analyzing the adversarial nature of the relationship is that Steinhardt knew that it was the subject of an SEC investigation, and that the memorandum was sought as part of this investigation." *Id.* The court supported the assertion that the relationship was adversarial by noting that the requests were from the SEC's Enforcement Division, which enforces laws and regulations addressing corporate fraud. *Id.* Although the investigation had not yet turned into a formal "enforcement proceeding," the mere presence of the SEC's investigation into the company was sufficient for the court to find that the relationship was adversarial in nature. *Id.* The court denied Steinhardt's contention that simply because it voluntarily cooperated with the SEC, the relationship was not adversarial. *Id.*

154. *Id.* at 236.

155. *Id.* ("Steinhardt does not dispute the SEC's assertion that there was no agreement that the SEC would maintain the confidentiality of the memorandum.") *Id.* at 232.

claiming protection under the Freedom of Information Act, but will honor a true confidentiality agreement.¹⁵⁶ The *In re Steinhardt* court stated, however, that it was not adopting an easy-to-apply rule and that determinations regarding voluntary disclosures to the government had to be made on a case-by-case basis, leaving open the idea that selective waiver may occur with a valid confidentiality agreement.¹⁵⁷

The Seventh Circuit addressed the issue in *Dellwood Farms, Inc. v. Cargill, Inc.* in 1997.¹⁵⁸ The court was very clear as to why the selective waiver would not be allowed in the case before it.¹⁵⁹ Yet, it did not completely disallow the selective waiver in other instances, stating that “the possessor of the privileged information should have been more careful, as by obtaining an agreement by the person to whom they made the disclosure not to spread it further.”¹⁶⁰

The Sixth Circuit has taken a view contrary to that of the Eighth, barring any selective waiver.¹⁶¹ The *In re Columbia/HCA Healthcare* court found that the “uninhibited approach adopted out of wholecloth by the *Diversified* court has little, if any, relation to fostering frank communication between a client and his or her attorney.”¹⁶² The court pointed out that allowing a selective waiver can only promote full and frank communication between the government and the corporation, not the corporation and its attorney.¹⁶³ The Sixth Circuit explained that the government is actually an adverse party, and neither the attorney-client privilege nor the work product doctrine has an

156. *See id.* at 230-36.

157. *See id.* at 236.

158. 128 F.3d 1122 (7th Cir. 1997). In this case, the FBI began investigating charges that Archer Daniels Midland (“ADM”) was conspiring with agricultural producers to fix prices of feed and food additives. *Id.* at 1124. During the investigation, the FBI recorded over one hundred hours of audio and video recordings of conversations of those involved in the conspiracy. *Id.* “In 1995 the Department of Justice began presenting evidence to grand juries. The grand jury investigating price fixing of lysine [had] returned several indictments to which ADM and several other defendants [had] pleaded guilty.” *Id.* “To induce ADM to plead guilty to these criminal antitrust offenses the government, without seeking or obtaining any kind of confidentiality agreement or protective order, played some of the tapes for the law firm representing ADM’s outside directors.” *Id.* The lawyers took notes of the played tapes. *Id.*

159. *Id.* at 1127 (holding that “failing to be careful—committing a mistake that while careless may also be harmless—is not by itself a compelling reason for stripping a person of his privilege.”).

160. *Id.*

161. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302 (6th Cir. 2002); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 603 (8th Cir. 1977).

162. *In re Columbia/HCA Healthcare*, 293 F.3d at 302 (footnote omitted). The court alluded to the *Diversified* court’s wholesale adoption of the selective waiver. *See id.*

163. *Id.*

interest in protecting adversaries from each other.¹⁶⁴ The Sixth Circuit distinguishes the *Diversified* opinion by explaining that the cases cited by the *Diversified* court are actually Fifth Amendment cases—*Diversified* drew the analogy that a person should not be forced to incriminate themselves—which are unrelated to the attorney-client privilege.¹⁶⁵ The court's strongest arguments, however, remain within the sword-and-shield and common law areas.

The *In re Columbia/HCA Healthcare* court further urged away from selective waiver under the sword-and-shield argument.¹⁶⁶ The court explained that allowing the attorney-client privilege to be selectively waived will then turn the selective waiver into “merely another brush on an attorney’s palette, utilized and manipulated to gain tactical or strategic advantage.”¹⁶⁷ The Sixth Circuit, denying any selective waiver whatsoever, explained that the attorney-client privilege is more of a common law right than a contractually-designed weapon for corporations to have at their disposal.¹⁶⁸ While rejecting the selective waiver, the court acknowledged that there are advantages to allowing a selective waiver: (1) governmental efficiency is aided as corporations are more willing to participate; (2) corporations may feel that they may disclose more honestly than before, engaging in an almost self-policing; and (3) it encourages settlements of disputes between the government and corporations by encouraging cooperative exchange of information.¹⁶⁹ In responding to these contentions,

164. *Id.* “Attorney-client privilege was never designed to protect conversations between a client and the Government—i.e., an adverse party—rather, it pertains only to conversations between the client and his or her attorney.” *Id.*

165. *Id.* at 302 n.22. Although the Sixth Circuit did a superb job of distinguishing *Diversified* on other grounds, this is the court’s weakest contention. *See id.* at 302-03. The Fifth Amendment is crafted to protect an individual from self-incrimination. *See id.* at 298 n.15. When the SEC forces, coerces, or otherwise manipulates a corporation to disclose privileged information, it is, in effect, using the powers given to it by the government to extract this information. If this disclosure, given in good faith, is then used against the individual again in either a civil or criminal capacity, the Fifth Amendment may be involved. However, it is true that nowhere within the rationale for the attorney-client privilege will one find full and frank communication with the government. *Id.* at 302.

166. *See id.* at 303. “Once ‘the privacy for the sake of which the privilege was created [is] gone by the [client’s] own consent’ . . . the privilege does not remain in such circumstances for the mere sake of giving the client an additional weapon to use or not at his choice.” *Id.* at 302-03 (quoting *Green v. Crapo*, 62 N.E. 956, 959 (1902)). “The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality as to others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.” *Id.* at 303 (citing *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981)).

167. *Id.* at 302 (citing *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993)).

168. *See id.* at 303. The court does acknowledge, however, that the *Teachers Insurance* approach, which honors a specific and well-crafted confidentiality agreement, does protect the expectations of both parties. *Id.* However, the Sixth Circuit stated that such an approach does not protect public policy, which is a goal of the attorney-client privilege. *See id.*

169. *Id.*

the court argued that the government's efficiency will not be aided by allowing selective waiver because the courts only draw a line between one litigant and another.¹⁷⁰ The court further urged the government to consider the public policy implications of governmental agencies entering into confidentiality agreements,¹⁷¹ as it believed the truth-finding process is significantly hindered by the SEC when the agency enters into such agreements.¹⁷² Investigatory agencies (including the SEC and the DOJ) should be acting to expose wrongdoers and their companies to the public, not working with the corporations to conceal their illegal activities.¹⁷³ Furthermore, the government has numerous tools at its disposal to bring illegal activities to light, and its "agencies 'have means to secure the information they need' other than through voluntary cooperation achieved via selective waiver."¹⁷⁴ The *In re Columbia/HCA Healthcare* court explained that one risk of entering into a tactical confidentiality agreement is that the agreement will not be honored.¹⁷⁵ Opting to enter into a confidentiality agreement is a tactical and strategic decision made by counsel.¹⁷⁶ Maintaining the privilege in this case would only result in unpredictable and uncertain outcomes, with courts trying to decipher which

170. *Id.* The Sixth Circuit's reasoning underlying this rationale is that it is of no consequence whether the government or a private law firm undertakes the investigation, because "[a] plaintiff in a shareholder derivative action or a qui tam action who exposes accounting and tax fraud provides as much service to the 'truth finding process' as an SEC investigator." *Id.* However, the underlying motive for bringing the suit may be significantly different between a government employee and a private law firm.

171. *Id.*

172. *Id.* The court illustrated this by stating that a private litigant stands in the same position as the government. *Id.* When litigants act as private attorneys, they vindicate the public interest. *Id.* Thus, the court felt "a difficult and fretful line-drawing process begins, consuming immeasurable private and judicial resources in a vain attempt to distinguish one private litigant from the next." *Id.*

173. *Id.* The court appeared to be almost disappointed that the government would consider the selective waiver notion. *See id.* "The investigatory agencies of the Government should act to bring to light illegal activities, not to assist wrongdoers in concealing the information from the public domain." *Id.*

174. *Id.* (quoting *United States v. MIT*, 129 F.3d 681, 685 (1st Cir. 1997)). The Sixth Circuit bolstered this proposition by illustrating the notion that the government not only has other means of obtaining this information, but can obtain this information in means that do not restrict the public from accessing it at a later time. *Id.* Although this proposition may be true, the court correctly notes the downside: "a higher cost in time and money." *Id.* (citing *MIT*, 129 F.3d at 685). One further important observation is that taxpayer dollars are at stake, not private litigants' money.

175. *Id.*

176. *Id.* at 304. Tactical decisions are commonly accompanied by a risk of loss. *See id.* By rejecting the selective waiver, the court believed that the likelihood that future attorneys would take such a risk would decrease, given the consistency with which most courts have decided this matter. *Id.*

line of reasoning to follow.¹⁷⁷ Similar to this decision, the *Westinghouse* court held that disclosing information to the government “has little relevance” to the unique role of an attorney as a confidential counselor.¹⁷⁸

The D.C. Circuit is another circuit court to reject the waiver, as seen in *Permian Corp. v. United States*,¹⁷⁹ which held that cooperation with a governmental agency is laudable but does not advance the purposes of the attorney-client privilege.¹⁸⁰ In rejecting the “some selective waiver,” the D.C. Circuit found that allowing the selective waiver for some and not other cases will only give attorneys another tool for manipulation.¹⁸¹ Because the so-called “middle ground”—allowing a selective waiver only after a valid confidentiality form is signed—is taken by many courts, an important issue is raised: what does a valid confidentiality agreement entail?¹⁸²

C. *The Middle-Ground: The Formation of a Valid Confidentiality Agreement*

The “middle-ground” approach allows the selective waiver as long as a valid confidentiality agreement is written and signed by both parties.¹⁸³ The confidentiality agreement should be clear, unambiguous, and drafted *with the government*.¹⁸⁴ The *Permian* decision illustrated that if the document or documents are unclear, it is unlikely the court will find a confidentiality

177. *Id.* The court noted that just as the attorney-client privilege provides confidence that information relayed to one's attorney will not be disclosed, rejection of selective waiver also provides certainty that waiver of the privilege will lead to the disclosure of information. *Id.* This line of reasoning—that disclosure was a risk to which counsel subjected their client—was acknowledged by the corporate counsel during oral argument. *Id.* The court found that “counsel . . . arrived at the decision to enter into the agreement with the Government after contemplating the possibility the agreement would not protect its confidential information.” *Id.* at 304 n.23.

178. *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991). The Third Circuit noted the opposing argument that a selective waiver might increase voluntary cooperation with government investigations. *Id.* The court explained that a new privilege must “promote[] sufficiently important interests to outweigh the need for probative evidence.” *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)). However, the court found that there is “little reason to believe . . . that this interest outweighs ‘the fundamental principle that “the public . . . has a right to every man's evidence.”’” *Id.* at 1425-26 (quoting *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990)).

179. 665 F.2d 1214, 1220 (D.C. Cir. 1981).

180. *Id.* at 1220-21.

181. *Id.* at 1221.

182. *See id.* at 1221-22. Forming a valid confidentiality agreement may be the determinative factor as to whether a selective waiver is permitted. *See id.* Thus, a proper formation of the confidentiality agreement is essential. *Id.*

183. *See, e.g., In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1373 (D.C. Cir. 1984).

184. *Burke, supra* note 123, at 64. A confidentiality agreement may be drafted in numerous ways, including by a stipulation before the court, or during a settlement with the government. *Id.*

agreement to exist.¹⁸⁵ Disclosure should also be curtailed for the specific government agency to whom the corporation is interested in disclosing information.¹⁸⁶ A properly-drafted confidentiality agreement may state, for instance, that the Enforcement Division of the Securities and Exchange Commission is the only party to whom disclosure is allowed.¹⁸⁷

The party should ask the government agency whether it is willing to take the actions necessary to protect the documents, if needed.¹⁸⁸ Similarly, the corporation should note the ways in which the confidentiality agreement works against the current investigation, or will work against a future investigation.¹⁸⁹ Most importantly, the corporation should not take any steps to produce documents until a valid confidentiality order is in place.¹⁹⁰

D. The Work Product Doctrine in Relation to the Selective Waiver

The work product doctrine is commonly addressed side-by-side with the attorney-client privilege in a court's analysis of the selective waiver.¹⁹¹ Some courts have come to the conclusion that the standards for waiver of the

185. See *id.* (citing *Permian*, 665 F.2d at 1217-18). The *Permian* court found "that a series of letters between the parties" was probably insufficient to establish the unambiguous and complete agreement that the *Steinhardt* court had in mind. See *id.* (citing *Permian*, 665 F.2d at 1217-18).

186. *Id.* at 64-65. This portion is crucial. For example, if the SEC was to disclose material to the DOJ, and the DOJ was subsequently sued for failure to disclose documents, the DOJ may be required to disclose documents under the FOIA because the DOJ was not the governmental entity that entered into a confidentiality agreement. However, if the SEC does not disclose the documents to others, the conflicts with the FOIA are much less troublesome.

187. *Id.* at 64-66. Author Burke gave an example of a properly drafted confidentiality order. *Id.* "The government entity agrees that the disclosing of the specific documents is privileged and confidential. The privileged materials and information provided to the government entity pursuant to this Agreement are provided solely for the limited purpose of cooperation in the investigation[.] . . ." *Id.* at 65. Burke continued, "[t]he government further recognizes that the disclosing party continues to assert all such applicable privileges." *Id.* This somewhat boilerplate example may not always be sufficient. A thorough review of pertinent case law hints that the more specific the confidentiality agreement is to the corporation's specific situation, the higher the likelihood that it will be honored. See *id.*

188. *Id.* at 66. Burke warned that the corporation should question whether the government is willing to take affirmative steps to protect the information. *Id.* Such steps would include defending lawsuits against the Commission for a release of the documents. See, e.g., Burns, *supra* note 64.

189. Burke, *supra* note 123, at 66. For instance, if the government is going to later bring a criminal case against members of the corporation, then the agreement should specifically state what exactly will be barred from admission into that case, and what will be permitted. *Id.*

190. *Id.* at 67 ("A party should not make the mistake of letting the horse out of the barn before closing the barn door.")

191. See, e.g., *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993).

attorney-client privilege and the work product doctrine are dissimilar;¹⁹² these courts typically find that the attorney-client privilege is “easier” to waive.¹⁹³ The Federal Rules of Civil Procedure support this notion.¹⁹⁴

Corporations may argue that investigative materials not covered by the attorney-client privilege are nevertheless protected by the work product doctrine. In truth, the comprehensive protection of the attorney-client privilege is not as extensive as the protection offered by the work product doctrine.¹⁹⁵ However, the work product doctrine may be abrogated in special circumstances.¹⁹⁶ In particular, if the work product contains “relevant,” non-privileged facts and the party seeking disclosure of the information can overcome the burden of proving “adequate reasons” for allowing discovery, the privilege is overcome.¹⁹⁷ This applies even to an attorney’s opinions, judgments, and thought processes.¹⁹⁸

The *In re Columbia/HCA Healthcare* court held that voluntary disclosure abrogated the attorney-client privilege, and, although initially differentiating between the protections,¹⁹⁹ the court further found that the disclosure affected the work product doctrine.²⁰⁰ The court stated that there

192. See, e.g., *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980). The work product privilege, in contrast to the attorney-client privilege, “does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney’s trial preparations from the discovery attempts of the opponent.” *Id.* (emphasis deleted) (citing *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947)). “A disclosure made in the pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege.” *Id.*

193. See *Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981) (comparing the “strict standard of waiver in the attorney-client privilege context with the more liberal standard applicable to the work product privilege”); *AT&T*, 642 F.2d at 1299.

194. The work product privilege is explicitly protected by the Federal Rules of Civil Procedure. See FED. R. CIV. P. 26(b)(3).

195. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 603 (8th Cir. 1977). The *Diversified* court found “that the qualified immunity or privilege accorded to ‘work product’ by the rule is to some extent broader than the absolute attorney-client privilege that has been discussed.” *Id.*

196. See FED. R. CIV. P. 26(b)(3).

197. See *id.* The party seeking discovery must show “substantial need” and inability to obtain the information elsewhere without “undue hardship.” *Id.*

198. Note that this requires more than “substantial need” and “undue hardship,” but is still possible. See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 507-10 (1947).

199. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 304 (6th Cir. 2002). The court explicitly stated that “[e]ven if [Columbia/HCA] is deemed to have waived the attorney-client privilege [], this does not necessarily mean that [Columbia/HCA] also has waived work product immunity.” *Id.* (quoting *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 951 F. Supp. 679, 689 (W.D. Mich. 1996)).

200. *Id.* at 306. The court noted that there is no compelling reason to treat the work product protection and the attorney-client privilege differently. *Id.* The court found that the rationale for disallowing the selective waiver in the attorney-client privilege context similarly applies to the work product doctrine. *Id.* This reasoning was supported in that “[t]he ability to prepare one’s case in confidence, which is the chief reason articulated in *Hickman* . . . for the work product protections has little to do with talking to the Government.” *Id.* The court held that even more so than a waiver of the attorney-client privilege, the waiver of the work product doctrine is a tactical decision. *Id.*

should not be a significant difference between the treatment of the two protections.²⁰¹

However, the work product doctrine is distinct from the attorney-client privilege. The work product doctrine, as discussed above, is broader than the attorney-client privilege in some respects.²⁰² The *Permian* court illustrated the difference between the two.²⁰³ It dismissed any notion of selective waiver with regard to the attorney-client privilege, but upheld the D.C. Circuit court's finding that the agreement between Occidental and the SEC preserved the work product protection.²⁰⁴ However, this analysis has not been universally adopted. The *Steinhardt* court followed the opposite view in rejecting both protections simultaneously.²⁰⁵

Ironically, the Eighth Circuit—the only circuit to have found in favor of the selective waiver—has found a waiver of the work product doctrine while concurrently holding the attorney-client privilege intact.²⁰⁶ In the Eighth Circuit case, *In re Chrysler Motors Corp. Overnight Evaluation Program Litigation*, Chrysler disconnected the odometers on vehicles so the “quality control” workers could take the cars home for a “test drive.”²⁰⁷ After this

Because both the attorney and the client know that “the material in question was prepared in anticipation of litigation,” the decision to “show your hand” is a quintessential example of litigation strategy. *Id.* at 306-07. “Like [the] attorney-client privilege, there is no reason to transform the work product doctrine into another ‘brush on the attorney’s palette,’ used as a sword rather than a shield.” *Id.* (quoting *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993)).

201. *Id.* at 306-07.

202. See generally *supra* Part III.

203. *Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981). The *Permian* court explained that the attorney-client privilege “exists to protect confidential communications” and to assure the client that statements made while “seeking legal advice will be kept strictly confidential” *Id.* (quoting *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980)). Further, a voluntary disclosure of such information is contrary to the confidential relationship and thus waives the attorney-client privilege. *Id.* (citing *AT&T*, 642 F.2d at 1299). However, in differentiating the work product doctrine, the court found that “[a] disclosure made in the pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the [work product] privilege.” *Id.* (quoting *AT&T*, 642 F.2d at 1299).

204. *Id.* at 1215.

205. *In re Steinhardt*, 9 F.3d at 236. The Second Circuit agreed with the district court’s findings that Steinhardt had voluntarily disclosed the work product to an adversary. *Id.* at 234. Therefore, neither the policy considerations behind the work product doctrine nor the attorney-client privilege merited the creation of an exception to the waiver rule. See *id.* at 236.

206. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977); cf. *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 845 (8th Cir. 1988).

207. *In re Chrysler Motors*, 860 F.2d at 845. Chrysler defended their “test-drive” program as a quality-control measure. *Id.* Chrysler was charged “with sixteen counts of mail fraud and odometer fraud.” *Id.* The allegations stated that “as many as 60,000 new vehicles had been driven with disconnected odometers.” *Id.* The class action was transferred to the Eastern District of Missouri, and Chrysler agreed to settle the civil litigation. *Id.*

“test drive” program was uncovered, both the government and private law firms brought suit against Chrysler.²⁰⁸ Chrysler had an independent auditor prepare an audit to determine how many cars had been driven off Chrysler facilities during this program.²⁰⁹ Chrysler presented this report to the outside counsel of a class action pursuant to a confidentiality agreement,²¹⁰ but refused to hand this analysis over to the government who subsequently brought a suit to compel disclosure of this report.²¹¹

The Eighth Circuit determined “that Chrysler waived any work product protection by voluntarily disclosing the computer tape to its adversaries, the class action plaintiffs, during the due diligence phase of the settlement negotiations.”²¹² The court reasoned that Chrysler’s confidentiality agreement with the class action plaintiffs had no bearing:²¹³ the linchpin of the work product doctrine is *confidentiality*.²¹⁴

The First Circuit has upheld the rule that upon disclosure, the work product doctrine’s protections dissolve.²¹⁵ In *MIT*, the First Circuit held that

208. *See id.*

209. *Id.* The class action liaison and independent auditor were instructed to complete the due diligence review of Chrysler’s documentation in regard to the “Overnight Evaluation Program.” *Id.* Chrysler identified the “vehicles by referring to the gate pass” (a pass given to the vehicle, allowing it to leave the plant) whenever a car left the lot. *Id.* Gate pass documentation included the time the vehicle left the plant, the type of vehicle, and whether the vehicle left the plant for company purposes or for the “Overnight Evaluation Program.” *Id.* Even the vehicle identification number and the driver of the vehicle were listed in the documentation. *Id.* The class action liaison was provided with access to all of the gate passes. *Id.* The incriminating information included in this disclosure is evident. *See id.*

210. *Id.*

211. *Id.*

212. *Id.* at 846. The court first addressed whether the tape in question was opinion work product, which is protected more stringently than ordinary work product. *Id.* Finding the tape to be merely “ordinary work product,” the court found that “the government has made the necessary showing of substantial need and undue hardship to overcome the ordinary work product privilege.” *Id.* at 847. Thus, the work product doctrine protected Chrysler until it disclosed the document to an adversary—the class-action plaintiffs. *Id.* at 846. At that time, the protection was waived, even if the disclosure ended in settlement. *Id.* The court noted that “[t]he work product doctrine was designed to prevent ‘unwarranted inquiries into the files and mental impressions of an attorney’ and recognizes that it is ‘essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.’” *Id.* (quoting *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 400 (1987) (quoting *Hickman v. Taylor*, 329 U.S. 495, 510-11(1947))). Once the information was made public, the need to prevent unwarranted inquiries into the mental impressions of the attorneys was no longer present. *See id.* at 846-47.

213. *Id.* at 847. The court’s reasoning behind denying recognition to the confidentiality agreement is that a common interest always exists between opposing parties in any attempt at settlement. *Id.* Furthermore, the fact that Chrysler and the co-liaison counsel struck an agreement to keep the material confidential has no bearing because it was not kept confidential. *Id.*

214. *Id.* The court held that by disclosing the information to opposing counsel, Chrysler was, in effect, disclosing the material to the public and abrogating any protections that may have existed at that time. *Id.*

215. *See United States v. MIT*, 129 F.3d 681, 687 (1st Cir. 1997).

the work product privilege is waived when information is disclosed to an adversary, regardless of any confidentiality agreement.²¹⁶

The Third Circuit noted that the standard for waiving the work product doctrine should not be more stringent than the standard for waiving the attorney-client privilege.²¹⁷ The policy behind the work product doctrine is to allow attorneys to act without the fear that their work will be used against their clients, thereby ensuring that the adversarial process operates efficiently.²¹⁸ In rejecting the validity of a confidentiality agreement to bar access to an attorney's work product, the Third Circuit stated that once the corporation had disclosed privileged information, it could not then rely upon the confidentiality agreement to protect itself.²¹⁹ This argument can be supported on public policy grounds as well. If the corporation (or independent, outside counsel) is preparing information which it knows will later be used by a government agency, the investigatory body may be reluctant to discover information that might not help its claim, but is

216. *Id.* MIT made a disclosure to an audit agency. *Id.* at 686-87. This disclosure did not occur in litigation, in which the parties shared a common interest. *Id.* The court explained that the audit committee's actions were critical in determining whether or not it was an adversary. *See id.* The audit committee "review[ed] MIT's expense submissions," something the court thought of as adversarial in nature. *Id.* at 687. Another salient point the court made was that adversarial parties are identified not by the subjective hope of the disclosing party, but by whether the investigation is adversarial. *Id.* The court ruled against the work product protection in this instance because of the "prevailing rule that disclosure to an adversary, real or potential, forfeits work product protection." *Id.* While stating that the work product may be overcome with a sufficient showing of need, the court found such circumstance not to apply in this case. *Id.*; *see also* FED. R. CIV. P. 26(b)(3). "[T]he potential for dispute and even litigation was certainly there . . . [t]he cases treat this situation as one in which the work product protection is deemed forfeit." *MIT*, 129 F.3d at 687.

217. *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1428 (3d Cir. 1991).

218. *Id.* at 1429. The court felt that "an exception for disclosures to government agencies is not necessary to further the doctrine's purpose; attorneys are still free to prepare their cases without fear of disclosure to an adversary as long as they and their clients refrain from making such disclosures themselves." *Id.*

219. *Id.* at 1431. The Third Circuit's rationale was founded upon the difference between the two protections' underlying framework. *Id.* The attorney-client privilege is waived upon disclosure to a third party, unless the disclosure is "necessary to further the goal of enabling the client to seek informed legal assistance." *Id.* at 1428. However, because the work product doctrine protects the attorney's work product from being disclosed to an adversary, disclosure to a third party will not automatically waive the privilege—the waiver must be to an adversary. *Id.* Because the court places such emphasis on the fact that a waiver of the work product doctrine must follow disclosure to an adversary, the relevant issue becomes, again, the definition of an adversary. *Id.* at 1431. "Thus, had the DOJ and the SEC not been Westinghouse's adversaries, and had we concluded that Westinghouse reasonably expected the agencies to keep the material that it disclosed to them confidential, we might reach a different result." *Id.*

nevertheless illegal.²²⁰ This will prevent attorneys from adequately preparing a case against the corporation.²²¹

The Ninth Circuit was recently confronted with the selective waiver but did not authoritatively rule on whether or not it would be permitted. In *United States v. Bergonzi*,²²² the Ninth Circuit faced a selective waiver issue stemming from a related California state court proceeding.²²³ The California court considered arguments from both sides:

As the Legislature has not explicitly set out the parameters for waiver of work product protection, we are, perhaps, slightly less constrained in determining the bounds of the doctrine But an assurance of work product protection would certainly act as a carrot to encourage cooperation with the government. Also, the employment of outside counsel to investigate alleged corporate wrongdoing is a laudable practice, which presumably would be encouraged by an assurance of work product protection.²²⁴

Although the California state court ruled against allowing a selective waiver, it clarified who it believed should solve the selective waiver problem: “[g]iven the Legislature’s expressed desire to control evidentiary privileges and protections, adoption of the selective waiver theory should come from that body.”²²⁵

220. *See id.* at 1431.

221. *See id.*

222. 403 F.3d 1048 (9th Cir. 2005).

223. The state court decision, *McKesson HBOC, Inc. v. Superior Court*, 9 Cal. Rptr. 3d 812 (Ct. App. 2004), answered the selective waiver concern. In this case, shareholder lawsuits were filed when improperly-recognized revenues came into light. *Id.* at 814-15. Skadden Arps, the law firm hired to represent McKesson, told the US Attorneys Office and the SEC that it was willing to disclose confidential information with proper confidentiality agreements in place. *Id.* at 815. The agreement was met, and Skadden Arps disclosed the material. *Id.* The agreements attempted to maintain the work product protection and the attorney-client privilege by stating that the firm and the SEC have a common interest in finding whether there were improperly-recorded revenues. *Id.* However, the court found that “McKesson waived its attorney-client privilege with respect to the audit committee report and interview memoranda.” *Id.* at 819. The court reached a similar conclusion in regard to attorney-client privileged material. *Id.* at 821.

224. *Id.* at 820. The Ninth Circuit, however, declined to address the issue, explaining that “we do not reach McKesson’s argument that we should recognize a form of ‘selective’ or ‘partial’ waiver that would allow a corporation to disclose the results of an internal investigation to an investigating government agency without waiving attorney-client privilege or work product protection as to the outside world.” *Bergonzi*, 403 F.3d at 1050. The court concluded, “[w]hether the sort of selective waiver McKesson seeks is available in this Circuit is an open question.” *Id.* Given that the Ninth Circuit did not overturn the lower court decision, it is possible that it will decide the issue, if it must, in line with the majority view: no selective waiver permitted for either the work product protected or attorney-client privileged documents. However, it is possible that the Ninth Circuit would rather defer to the legislature on the question of selective waiver.

225. *McKesson HBOC*, 9 Cal. Rptr. 3d at 821.

V. ISSUES ON THE SELECTIVE WAIVER HORIZON

A more recent development in Supreme Court case law that has a direct effect in corporate investigations can be found in the Court's holdings in *United States v. Booker*²²⁶ and *United States v. Fanfan*.²²⁷ These cases, decided by the Court on the same day, held the Federal Sentencing Guidelines to be unconstitutional.²²⁸ This move provides judges with greater discretion in sentencing criminals, including white-collar criminals.²²⁹ The abrogation of the Federal Sentencing Guidelines is particularly relevant when discussing the selective waiver. Because the sentencing guidelines are now simply advisory and not mandatory, jurists have much more power with which to decide jail time.²³⁰ For example, the DOJ had been using the guidelines to induce pleas, but that leverage has markedly diminished.²³¹

Ironically, white-collar criminals who are unable to reach pre-trial pleas and are often convicted by juries will likely benefit from *Booker* and *Fanfan*.²³² The sentencing guidelines list a series of factors that the jury is to consider when increasing or decreasing a prison sentence.²³³ For white-collar crimes, the factors for sentencing a corporate executive include: (1) "the amount of money involved in the fraud;" (2) "the extent of their

226. 125 S. Ct. 738 (2005).

227. 125 S. Ct. 12 (2005).

228. See *Booker*, 125 S. Ct. at 756. The Court found the guidelines to be unconstitutional because they denied the defendant's Sixth Amendment guarantee to the right of trial by jury. *Id.* at 743. The constitutional violation occurred because judges were required to make factual determinations about issues that were not presented to jurors, such as whether the defendant displayed remorse or played a leadership role in a particular criminal conspiracy. *Id.* Justice Breyer specifically called on Congress to fix the problem, noting that "[t]he ball now lies in Congress' court." *Id.* at 768.

229. See Mike France & Lorraine Woellert, *Corporate Cases: Time to Cut a Deal?*, BUS. WK., Jan. 24, 2005, at 43. The Court's decision was extremely timely—during the period in which some of the most infamous corporate crooks were facing trial, the Court repealed much of the leverage held by the DOJ and the SEC. *Id.* However, in the "longer-term, other execs could suffer if Congress rewrites the Sentencing Guidelines to punish unpopular business criminals more harshly than the old system did." *Id.*

230. See *id.*

231. See *id.* The Federal Sentencing Guidelines were generally considered harsh and less lenient than the sentences most jurists would give. See *id.* The legal community recognizes that many federal judges may issue more lenient sentences now that they are given the discretion to do so. See *id.*

232. See *id.* In the short term, corporate criminals will have more leverage when negotiating pleas. *Id.* CEOs and corporate executives may now be able to withhold disclosure of pertinent facts that would have been disclosed as part of the previously mandated "cooperat[ion] with investigators." See *id.* After *Booker* and *Fanfan*, this call for cooperation is only advisory, not mandatory. *Id.*

233. See *id.*

supervisory and fiduciary responsibilities;" (3) "the vulnerability of the victims;" and, most importantly, (4) "*whether they cooperated with investigators.*"²³⁴

Because juries primarily take into account whether a defendant "cooperated with investigators" when determining to increase or decrease a sentence,²³⁵ the existence of the selective waiver becomes extremely relevant. If a selective waiver is passed through legislation, Congress will, in effect, nullify any detriment a corporation may face from private litigants.²³⁶ Juries will view corporations in a more favorable light because corporations would likely quickly disclose any incriminating evidence in the hope of gaining the benefit of this mitigating factor.²³⁷ While *Booker* and *Fanfan* could lead to more lenient sentences for a given crime, Congress must consider these decisions if, or when, it drafts a selective waiver. A true limited waiver, if passed during this current wave of corporate malfeasance, may benefit corporate criminals much more than it would benefit taxpayers and government investigations.²³⁸

Another current issue is whether or not a corporation should have to admit guilt when entering into a settlement with the government.²³⁹ If a corporation has broken the law, the SEC will usually settle with the corporation.²⁴⁰ The settlement language as to the corporation's culpability is generally phrased as "[we] neither admit nor deny" guilt.²⁴¹ This language allows a corporation to escape guilt in the public eye because it has not

234. *Id.* (emphasis added). Since a white-collar case tends to involve much more money than a typical criminal case, the "amount of money" factor weighs heavily against defendants. *See id.* This results in aggravating factors outweighing any mitigating factors. *Id.* In addition, because the guidelines are now merely advisory, the factor encompassing "cooperat[ion] with investigators" will likely not have as much bearing as it once did. *See id.*

235. *See id.*

236. For example, if a corporation were to withhold information—thereby disabling itself from using its cooperation with investigators as a mitigating factor in sentencing—it would do so because the corporation does not want the disclosed information to result in the filing of class action suits by private litigants. However, if a selective waiver is passed, then corporations will likely disclose incriminating information to the fullest extent possible because it will not fear subsequent lawsuits from private litigants (save the exception of trying to cover up crime from the government, although this is generally of much less of a concern than class-action suits). Therefore, the greatest advantage of withholding information will become a moot issue, and a corporation's cooperation with investigators will be a strong mitigating factor in the sentencing analysis. Corporations will disclose information freely in order to reap the rewards as disclosure becomes a mitigating factor at sentencing.

237. *See id.* Whether this is the case will be determined as the effects of *Booker* and *Fanfan* unfold. *Id.* (noting that "it may be premature for corporate defendants to pop the champagne.").

238. *See id.*

239. *See* Adrienne Carter & Amy Borrus, *What if Companies Fessed Up?*, *BUS. WK.*, Jan. 24, 2005, at 59.

240. *See id.*

241. *Id.*

expressly admitted engaging in illegal activity.²⁴² While the SEC is currently considering reforming this practice, requiring an admission of guilt has far-reaching effects.²⁴³ First, it will drive up the cost of government investigations.²⁴⁴ Corporations will fight much harder if an admission of guilt is at stake.²⁴⁵ Further, the SEC staff of roughly 3,100 does not have the resources to file suit against every corporation that has broken the law.²⁴⁶ Given that the stakes would be larger if a corporation was found guilty, it would likely be extremely hesitant to disclose confidential information. Thus, a selective waiver would have virtually no benefit.²⁴⁷

If companies are coerced into admitting guilt, plaintiffs' attorneys will have a significantly easier time creating a case against the corporation.²⁴⁸ This may result in the disappearance of the selective waiver: there will be no benefit whatsoever for a corporation to enter into a selective disclosure agreement with the government if what the government finds will be used against the corporation to force it to admit guilt.²⁴⁹ If a corporation does not admit guilt and instead chooses to fight the government in court, the outcome of that case will determine whether private litigants may "ride the coattails" of the government in their own suits.²⁵⁰

242. *Id.* at 59-60. While those in the legal and business communities recognize that a corporation would not pay \$500 million without reason, investors do not know what the "admit nor deny" language reveals, if anything. Use of this language allows CEOs and CFOs to turn around their plank walk and act as though they did nothing illegal. *See id.*

243. *See id.*

244. *See id.*

245. *Id.* The SEC acknowledges that requiring a corporation to acknowledge wrongdoing would drive up costs tremendously. *See id.* Last year, the SEC brought 639 cases. *Id.* If an admission of guilt was the aim, the Commission would only have been able to bring a fraction of them. *Id.* Requiring the SEC to push for sweeping admissions of guilt "would be a terrible waste of government resources," because, with so much at stake, corporations would undoubtedly fight until the end to avoid this admission. *Id.*

246. *See id.*

247. *See id.* If the goal of a selective waiver is to encourage corporate disclosure that would help the government "root out" criminal activity, this goal will be frustrated—a corporation will no longer have the incentive to help the SEC once it knows that the SEC is expecting it to admit guilt, because it will fear that private litigants will "ride the coattails" of the SEC and bring their own civil suits. *See id.*

248. *See id.* "Under long-standing legal rules, admissions made in governmental proceedings can be entered as evidence in private litigation." *Id.* at 60. This will significantly reduce the burden of proof on plaintiffs' attorneys bringing an action against the same corporation. *Id.* In some cases, it will render the corporations completely defenseless. *See id.*

249. *See id.*

250. *See id.*

Selective disclosure will also be relevant if social security is invested into private accounts. If this occurs, Wall Street will experience a huge influx of wealth within a relatively short period of time.²⁵¹ The security of this money will not only be vital to the retirement of millions of Americans, but will have a significant impact on the American economy as well.²⁵² As the past has taught us, the government must keep a watchful eye on the managers of this money.²⁵³ The selective waiver would enable the government to investigate wrongdoing without private plaintiffs' firms winning large class action lawsuits and taking money out of the pot.²⁵⁴ Thus, unlike the "neither admit nor deny" scenario, a selective waiver in the social security context may be necessary.²⁵⁵

251. See Amy Borrus, *Windfall on Wall Street?*, BUS. WK., Jan. 24, 2005, at 76.

252. See *id.* ("No question there's big money to be made down the road. The estimated \$54 billion that could pour into the markets is roughly a quarter of stock and bond mutual funds' annual take now.").

253. *Id.* Every investment branch of every investment agency will lobby for a portion of the money. *Id.* Banks will lobby for CODs. *Id.* Insurers will lobby that retirees should be forced to convert private accounts into annuities. *Id.* The most important decision to be made will be who gets this windfall, and how that investment firm is policed. See *id.*

254. Not allowing a selective waiver in this instance could prove horrifying. Imagine that a firm steals a large amount of money from a pension fund that is linked to the privatized social security accounts. The government conducts an investigation, finds the firm liable, and forces it to return the money. Predictably, a plaintiffs' law firm will bring suit using the documents subpoenaed by the government. See, e.g., *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609-17 (8th Cir. 1977). Unfortunately, roughly a third (possibly less if the settlement is in the tens of millions of dollars or more because of the mitigated attorneys' fees received upon large settlements) of the money will go to the attorneys' fees, not back to the investors. This outcome is similar to what currently occurs in situations involving corporate theft. See *id.* However, there is one significant difference. In the corporate setting, very few people rely directly on that stock or income derived from that stock for their sole retirement basis. If social security is diversified into the markets, the money invested in the privatized equity markets will be a portion of the total amount of benefits to be paid to Americans upon retirement. Allowing plaintiffs' lawyers to collect large fees will inevitably lead to smaller payouts over time for the individuals who have chosen to invest in the markets. This will reduce the net effect of the increased returns offered by the private markets over the current government return on the monies invested in social security pension accounts.

255. This scenario may call for something more than a narrow "limited waiver" or "selective disclosure." For example, if the government alone were allowed to prosecute these cases, subsequently returning the money to the social security fund, the outcome would benefit the investing public without depleting the public's retirement accounts through attorneys' fees.

VI. CONCLUSION

In common law, the attorney-client privilege and the work product doctrine are premised on the beliefs that an attorney should be able to communicate fully and frankly with his or her clients, and that an attorney's work product should be protected from discovery.²⁵⁶ But when a corporation faces an investigation by a government agency, allowing the materials discovered by the agency to be used by a plaintiff's firm against the corporation hinders the government's investigation by slowing its progress and decreasing the amount of disclosure provided.²⁵⁷ But it is true that if a corporation breaks the law, the government should not aid it by hiding its crimes; such action would result in increased costs to taxpayers due to the inefficiency arising in the investigation.

Allowing a special waiver will increase the corporation's ability to effectively disclose material to the government and would allow the discovery process to operate both smoothly and more efficiently.²⁵⁸ Further, corporations should not be able to selectively disclose material to the government only to withhold the same materials to other opponents for tactical reasons. Allowing such a process would simply aid corporations in further manipulation of the legal system.

A middle ground must be struck. The possibility of allowing a selective waiver in certain scenarios should be legislated. The SEC is understaffed, underfinanced, and too overburdened to punish those who have broken the law and effectively deter those who may in the future. Private plaintiffs' firms—although possibly receiving a windfall—may be the necessary parties to achieve the deterrence and punishment necessary to stop corporate fraud.

256. See *supra* Parts I & II. The Supreme Court noted that impairment of these privileges would "not only make[] it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threaten[] to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981).

257. Brodsky et al., *supra* note 1, at 1. For example, when a company discloses information to auditors about the handling of allegations, it risks waiving the privileges affecting legal work, analyses, advice of counsel, and witness interviews. *Id.* at 6. This material is at the heart of companies' expectations as to what will be protected from actual and potential adversaries. *Id.* When the disclosure of this information becomes a pressing concern, corporations will inevitably withhold as much as legally possible. *Id.*

258. See *supra* Parts IV & V.

However, it may not be practical for certain corporations or industries to utilize the selective waiver. The proper resolution of this issue through legislation is essential. The outcome will affect nearly every government corporate investigation, thousands of plaintiffs' law firms, and almost every corporation that operates in America.²⁵⁹

Zach Dostart²⁶⁰

259. See generally Brodsky et al., *supra* note 1, at 1. Companies expect the attorney-client privilege and the work product doctrine to be protected by courts. *Id.* If the privileges vanish, there is the risk that counsel's work product will be turned over to opponents in litigation through discovery, and corporations may then become discouraged to seek counsel when they need it the most. The fact that operating an honest corporation and fully cooperating in an investigatory process may lead to different results must be remedied through legislation. See *id.*

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